



REPUBLIC OF KENYA



**Odek v Adoyo (Civil Appeal E044 of 2021)  
[2023] KEHC 735 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 735 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E044 OF 2021**

**KW KIARIE, J**

**FEBRUARY 9, 2023**

**BETWEEN**

**ANDREW OTIENO ODEK ..... APPELLANT**

**AND**

**QUINTER ADHIAMBO ADOYO ..... RESPONDENT**

*(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's  
CMCC No. 17 of 2020 by Hon. J.S. Wesonga–Principal Magistrate)*

**JUDGMENT**

1. Andrew Otieno Odek, the appellant herein, was the defendant in Homa Bay Chief Magistrate's CMCC No.17 of 2020. He had been sued for relief in general damages for defamation.
2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Nyauke & Company Advocates. He raised the following grounds of appeal:
  - a. The honorable learned magistrate erred in law and fact when she failed to award the defendant costs upon dismissing the plaintiffs' case.
  - b. The honorable magistrate failed to follow the beaten track on issue of costs.
3. The respondent opposed the appeal and filed a cross-appeal through the firm of Robert Ochieng Advocates. She raised the following grounds:
  - a. That the learned trial magistrate misdirected herself on several points of law and facts.
  - b. That the learned trial magistrate erred in fact by properly finding that the appellant and his advocate on record had essentially perjured themselves by lying under oath as to the defamatory subject material but in the same breath decided that such conduct criminal conduct was not a reflection of, or as a result of, the subject defamatory material.



- c. That the learned trial magistrate erred in law in fact in finding that the subject matter material was defamatory but that that damages could not be awarded for supposed lack of “hate and shunning” by the third party that the said material was directed at.
  - d. That the learned trial magistrate erred in law and in fact in not awarding the suit on behalf of the plaintiff/cross appellant when the facts and evidence suggested that the defamatory material led to the breakdown of the plaintiff/cross appellant’s relationship with his her master/employer to whom the defamatory communication was made.
  - e. That the learned trail magistrate failed to comprehend the fact that the advocate on record for the defendant/appellant was willing to go to the extent of giving false testimony and giving testimony in which he was steeped in conflict of interest was manifest of the adverse effect of the defamatory subject matter communication between him and the cross appellant.
  - f. That the learned trial magistrate misdirected herself on the law with regards to defamation.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
  5. After perusing the evidence on record, I am satisfied that the learned trial magistrate arrived at a correct conclusion as to who was the author of the complained words and to whom it was addressed. The appellant in an email sent to Mr. Nyauke, the then employer of the respondent, stated in respect of respondent:
 

“What she did was not only unprofessional and incompetent but also borderline malicious and disrespectful, if not entirely suspect...I have since come [sic] across information depicting what can only be summed up as conflict of interest on the part of Ms. Adoyo in this matter. Apparently, she is not only close to one of the defendants but was in constant communication with him days leading to the dismissal. This points to sabotage and clearly proves misrepresentation of facts in the court was deliberate and calculated. It is inexpressibly disheartening that I now have to not only deal with the defendants but worry about crippling betrayal from someone obligated to have my best interest.”
  6. The genesis of this matter was on 14<sup>th</sup> March 2019 when the appellant was expected to be in court for a hearing of his matter. When his name was called out, he did not respond. On the previous day the respondent contended that the appellant had been contacted on phone to appear. The appellant confirmed the same. When he failed to respond, she prayed for an adjournment but the application was declined. The matter was therefore dismissed for want of prosecution.
  7. The appellant on the other hand contended that he attended court on 14<sup>th</sup> March 2019 in respect of ELC No. 12 of 2015. He was called and the advocate holding brief for Mr. Nyauke stood up. He was later told that his matter had been dismissed. He conceded that he was aware of his matter coming up for hearing. He said that when the respondent sat down, he left the court without talking to her.
  8. From the brief history of the genesis of this case, I am satisfied that the appellant was not truthful when he said he was in court and indeed wanted to shift blame to the counsel.



9. The respondent attached a copy of the Law Directory which on page 112 gives the email address of the firm of Nyauke & Company Advocates the same as in the complained of mail. It was therefore misleading for the Mr. Nyauke to claim that that was not his email address.
10. The communication to Mr. Nyauke by the appellant was a complaint though based on falsehoods and adverse comments on the professional reputation of the respondent. Mr. Nyauke was the then employer of the respondent this communication cannot therefore amount to communication to a third party. Had it been communicated to a third party, this would have been defamation. The cross appeal is dismissed.
11. When a party relies on falsehoods to accuse another to the employer, the latter would have been entitled to damages had she/he been dismissed from employment. Since she was accommodated for one year in her former employer's office, this may have meant that though their employment relationship did not remain the same, the employer was not convinced of the accusations.
12. Section 27(1) of the *Civil Procedure Act* provides as follows:

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers; provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.
13. Although the learned trial magistrate did not give her reasons as to why she did not award the costs to the defendant, it is clear that the appellant's complaint against the respondent was based on falsehoods to cover for his absence from court. I will not disturb this order. Consequently, I dismiss the appeal with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**KIARIE WAWERU KIARIE**

**JUDGE**

